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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR AUGUST.

The Supreme Court of Nebraska has recently decided, in *Globe Publ. Co. v. State Bk. at Crete*, 59 N. W. Rep. 683, that
Abatement a suit pending to enforce a right or a remedy conferred solely by statute, is abated by the unconditional repeal of that statute. This doctrine seems to be a little too broadly stated, at least under existing conditions in most of the states. If there is another remedy at law, there is no reason why the proceedings should not be so amended as to apply for that remedy.

The Supreme Court of Washington has ruled that when a debtor tells a person in whose hands an account has been
Account Stated placed for collection, without making any objection, that he will pay it, it is a stating of account between the parties, and the account will bear interest from the date of the promise: *Stickler v. Giles*, 37 Pac. Rep. 292; but the Supreme Court of Alabama seems to have adopted an unsound doctrine in *Loventhal v. Morris*, 15 So. Rep. 672, in ruling that when a merchant renders a statement of goods sold, which is assented to by the debtor, and payments thereon are made at various times thereafter, he cannot recover in an action on an account stated, without proof that a new account, showing the balance due, had been rendered, and assented to by the debtor. Head, J., dissented, and with good reason; for the action could be properly brought on the original account, and the payments be either allowed as credits, or set up by the debtor as matter of defence.

The rights of a child adopted under a common law agreement are well supported by the decision of the Supreme
Adoption,
Rights of Child Court of Nebraska in *Kofka v. Rosicky*, 59 N. W. Rep. 788, to the effect that where a child was given by her parents to her uncle and aunt on an

agreement that they should adopt, rear and educate her, and at their death leave her all the property they might own,—in pursuance of which she lived with them till they died, taking their name, and being taught to consider them her father and mother, and her real parents her uncle and aunt,—but the adoptive parents did not devise to her a certain piece of real estate, the facts amounted to such a part performance of the agreement as would entitle her to a decree giving her possession of the land by way of specific performance.

The Court of Civil Appeals of Texas has very properly ruled that a change in the Christian name of a defendant is not such an amendment as will give him the benefit of the statute of limitations: *Middlebrook v. David Bradley Mfg. Co.*, 27 S. W. Rep. 169; and the Supreme Court of Wisconsin holds, in accordance with the weight of authority and principle, that when the record in a criminal case, through the negligence of the clerk, fails to show that the defendant was present at all times during the trial, it may be amended to show such facts, on the testimony of the clerk and the sheriff, after the defendant has sued out a writ of error, and at a subsequent term: *Hoffman v. State*, 59 N.W. Rep. 588.

The Supreme Court of Minnesota holds that when all the orders of an award are to be performed by one party, some of which are good and some bad, the latter fact will not discharge the party as to those which are good: *Bouck v. Bouck*, 59 N. W. Rep. 547.

When an insolvent debtor executes a chattel mortgage to several creditors, with power of sale, conditioned that any surplus over their claims shall be returned to the grantor, such an instrument is not to be construed as a general assignment for the benefit of creditors, according to the Court of Appeals of Colorado: *McCord-Bragdon Co. v. Garrison*, 37 Pac. Rep. 31; nor is a trust deed, under such circumstances, as decided by the Court of Civil Appeals of Texas: *Collins v. Sanger*, 27 S. W. Rep. 500; nor, in the opinion of the Supreme Court of Nebraska, will

such be the effect of several chattel mortgages made simultaneously, covering all the property of the debtor, and leaving other creditors unsecured, though there be an agreement among the creditor mortgagees to share *pro rata* in the proceeds: *Smith v. Phelan*, 59 N. W. Rep. 562. A creditor, however, who after assignment levies upon and sells a part of the assigned property, and retains the proceeds, is held by the Court of Appeals of Colorado not to be entitled to participate in the assignment: *Beifeld v. Martin*, 37 Pac. Rep. 32.

According to the Supreme Court of Arkansas, the priority of an attachment is lost when the plaintiff, at the time of placing the writ in the officer's hands, tells him
 Attachment,
 Priority not to serve it unless some other person gets out an attachment; and another writ, placed in the hands of the officer before that order is countermanded, will take precedence: *Florsheim Bros. Dry Goods Co. v. Geo. Taylor Com. Co.*, 27 S. W. Rep. 79.

The cause of woman's rights has just met with notable encouragement from the Supreme Court of New Hampshire.

In *In re Ricker*, 29 Atl. Rep. 559, that court,
 Attorneys after a thorough investigation into the nature of the attorney's calling, his powers, duties, and responsibilities, has decided, that the vocation of a member of the bar, as an attorney and an officer of the court, is not a public office, within the common-law rule which excludes women from government by withholding electoral and official power, and that rule does not therefore prevent a woman from being licensed to practice as an attorney. The reasoning which supports this opinion is very able and cogent, and would probably prove convincing to any unprejudiced student of the question, but most men are unfortunately very strongly prejudiced on this score, and the weight of authority is rather against this view: *Re Bradwell*, 55 Ill. 535; *Bradwell v. State*, 16 Wall. 130; *Re Lockwood*, 9 Ct. Cl. 346; *Re Goodell*, 39 Wis. 232; *Robinson's Case*, 131 Mass. 376; *Re Leonard*, 12 Ore. 93; *S. C.*, 6 Pac. Rep. 426. But it is worth noting that in all these cases the decision is based more on esthetic

than legal grounds—such as the impropriety of permitting women to handle the filth which is so apt to defile a lawyer's hands in certain classes of cases, and the like; that in most of the states where the right has been refused, that refusal has been followed by an express grant from the legislature; and that the tendency of the more recent cases has been almost uniformly in favor of the admission of women: *Re Mary Hall*, 50 Conn. 131; S. C., 21 Am. L. Reg. (N. S.) 728; *Re Kilgore*, 14 W. N. C. 466; S. C., 17 W. N. C. 475, 562; *Re Thomas*, 16 Colo. 441; S. C., 27 Pac. Rep. 707; *Re Leach* (Ind.), 34 N. E. Rep. 641.

An attorney's lien for services cannot be successfully asserted against money appropriated to the client by act of the legislature, while such money is in the custody or under the control of the state treasurer, by the decision of the Supreme Court of Nebraska: *State ex rel. Sayre v. Moore*, 59 N. W. Rep. 755; and according to the Supreme Court of Oregon, a district attorney is entitled to but one fee, where several persons are jointly indicted for the same offence, and jointly tried: *Union Co. v. Hyde*, 37 Pac. Rep. 76.

The Supreme Court of Nebraska has laid down a very reasonable rule with regard to membership in a railroad relief association, in *Burlington Vol. Relief Dept. v. Beneficial Associations White*, 59 N. W. Rep. 747, by holding that when the department, with knowledge of the fact that no formal application for membership had ever been made, caused assessments to be deducted from a supposed member's pay on the basis of such membership, it was thereby estopped from disputing his membership. Of even more importance to the beneficial societies of which this country is full, was the decision of the Supreme Court of Errors of Connecticut, in *Fawcett v. Supreme Sitting of Order of Iron Hall*, 29 Atl. Rep. 614, to the effect (1) that when the certificate issued promises to pay \$1000 in seven years, on payment of \$2.50 on each assessment, but is silent as to the number of assessments to be made, the society cannot be said as a matter of law to be guilty of fraud; and (2) that when a

beneficial organization doing business in several states becomes insolvent, and a receiver of all its estate is appointed by a court of the state in which it was incorporated, a receiver appointed in one of the other states is not bound to pay over to him the reserve fund held by its branches in that state, though claimed by the general receiver for general distribution among certificate holders, but those funds should be retained for distribution in their own state, on the election of the certificate holders to treat the contract as rescinded and demand a return of the payments thereon. The Court of Appeals of Maryland refused to allow a similar claim made by a general receiver appointed for the state against local receivers, unless the former could show that their authority extended to the local branches, and that the property in the hands of the latter belonged to the Supreme Sitting and not to the local branches: *Weiner v. Sturgiss*, 29 Atl. Rep. 613. These decisions, however, are rather questionable innovations on the general rule in such cases, which is, as truly said by Hamersley, J., in his dissenting opinion in the Connecticut case, that when a corporation is chartered by a single state, and does a lawful insurance business in other states, through agencies, and becomes insolvent, its assets should be gathered at the domicile and there distributed according to the principles of equity.

The Supreme Court of Nebraska, following the decision of the Supreme Court of the United States in *Nebraska v.*

Boundaries *Iowa*, 12 Sup. Ct. Rep. 396, has lately reasserted the general rule, that when the middle of a stream is the boundary between two estates, and the water undermines the bank on either side, so that it caves in, the owner of the land stands the loss, and the middle of the stream is still the boundary, but that if the stream makes itself a wholly new bed by cutting across a bend or neck, the middle of the old bed remains the boundary, though dry: *Bouvier v. Stricklett*, 59 N. W. Rep. 550. And the Supreme Court of Indiana has ruled, that land described as bounded by the line of a railroad extended to the line of rails, if the grantor

could convey so far, and not simply to the right of way: *Reid v. Klein*, 37 N. E. Rep. 967.

The constantly mooted question as to the liability of common carriers with connecting lines has been considerably elucidated by the published decisions of the past month. The Supreme Court of Minnesota has held that such carriers do not become joint carriers by establishing joint or through tariffs, or rates, but the one receiving the goods becomes the agent of the others to contract for carriage over their respective lines: *Wehmann v. Minn., St. P. & S. M. Ry. Co.*, 59 N. W. Rep. 546. The Court of Civil Appeals of Texas has decided that when connecting carriers are partners in the transportation of freight, the initial carrier cannot by contract limit its liability for injuries to through freight to such injuries only as occur on its lines: *Gulf, C. & S. F. Ry. Co. v. Wilbanks*, 27 S. W. Rep. 302; and the Supreme Court of Michigan has taken the ground that when a shipper knows that his goods must be delivered to a connecting line, and agrees that after the goods leave the receiving road it shall be treated as a forwarder only, the receiving road will not be liable for a conversion by the connecting line: *McEacheran v. Mich. Cent. Ry. Co.*, 59 N. W. Rep. 612. Apropos of the general subject of liability, the Supreme Court of Minnesota also held, in the case from that state last cited, that a stipulation that a common carrier should be relieved from liability needs a consideration to make it binding; that the mere receipt of goods and undertaking to carry them is not such a consideration; and that no abatement or concession in rates, when forbidden by law, can form a sufficient consideration: *Wehmann v. R. R.*, *supra*. But the Supreme Court of Missouri has ruled that a statute, which provides that a common carrier shall be liable for any loss caused by its own negligence, or that of any connecting carrier, does not prohibit a carrier from contracting with the shipper against liability beyond its own line: *McCann v. Eddy*, 27 S. W. Rep. 541.

In the opinion of the Supreme Court of Indiana, the board

of county commissioners is a corporation, capable of taking
 Charities a devise for the establishment of a home for the
 benefit of worthy homeless people and orphans:
 Comrs. of Rush Co. *v.* Dinwiddie, 37 N. E. Rep. 795.

The same court has also ruled that in considering the constitutionality of a statute, the court has no right to take into
 Constitutional consideration its justice, advisability and policy:
 Law State *ex rel.* Smith *v.* McLellan, 37 N. E. Rep. 799. The Supreme Court of New Hampshire holds that, when the constitution provides that the house of representatives shall be judge of the returns, election and qualifications of its members, no court is authorized to order or advise the clerk as to whose name shall be placed on the roll: Bingham *v.* Jewett, 29 Atl. Rep. 694; the Supreme Court of Minnesota, that a statute which requires street railway companies to protect motormen from the weather by an inclosure for that purpose, is constitutional: State *v.* Hoskins, 59 N. W. Rep. 545; and the Supreme Court of New York, Fifth Dept., that a statute amending a statute already superseded by an amending statute is valid when the evident intention was to amend the amendatory statute, and not the amended statute: Peo. *v.* Upson, 29 N. Y. Suppl. 615. With this last case may be compared an annotation on the effect of an amending statute, in 1 Am. L. Reg. & Rev. (N. S.), 566-571.

The statute of frauds continues to receive its full share of attention. The Supreme Court of Nebraska has decided that
 Contracts the verbal promise of A to B, to indemnify him if
 he will become surety for C for a debt of the latter to D, is not a promise on the part of A to answer for the debt of C within the statute: Minick *v.* Huff, 59 N. W. Rep. 795; and the Supreme Court of Michigan, that a written order to insert an advertisement is such a written contract as to exclude evidence of a contemporaneous parol agreement that if the advertisement did not suit, it could be discontinued at any time: Cohen *v.* Jackoboice, 59 N. W. Rep. 665. On the general subject of contracts, the Appellate Court of Indiana has held, in opposition to Davis *v.* Shafer, 50 Fed. Rep. 764,

that a contract of subscription which provides that the subscribers would pay the builder of a factory a certain amount, and stating the amount of their respective subscriptions thereto, is several, not joint: *Davis & Rankin Mfg. Co. v. Booth*, 37 N. E. Rep. 818. The Supreme Court of Michigan has decided that an order taken by the plaintiff's agent from defendant for the purchase of goods from the plaintiff, subject to plaintiff's approval, was a unilateral contract, subject to countermand by defendant at any time before acceptance, though the order expressly stated that it was not so subject; that a letter from defendant to plaintiff, reciting that plaintiff had received an order from defendant for an article, and asking him to hold it until further notice, was a countermand; and that mailing a postal to defendant accepting the order, before receiving notice of the countermand, made the contract complete: *Peck v. Freeze*, 59 N. W. Rep. 600. The Supreme Court of Indiana, following the weight of authority and rejecting *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, has adopted the doctrine that a water company, that agrees to supply water to a city to extinguish fires, is not liable to a private person whose property is destroyed in consequence of its failure to furnish water, as he is not a party to the contract: *Fitch v. Seymour Water Co.*, 37 N. E. Rep. 982. The Supreme Court of Wisconsin has repeated the well-settled rule that a wife may avoid her contract, extorted by a threatened criminal prosecution of her husband, on the ground of duress: *City Natl. Bk. of Dayton v. Kusworm*, 59 N. W. Rep. 564; and the Supreme Court of Nebraska has ruled that the defence of insanity may be set up to an action on a contract, without restoring what the insane person receives thereunder, if its restoration *in specie* is impossible: *Rea v. Bishop*, 57 N. W. Rep. 555.

The court last mentioned has also decided that when the officers of a corporation are shown to have abused their trust, to the great damage of the corporation, in the
 Corporations interest of another corporation, of which they were and still are managing officers, any stockholder of the corporation wronged may bring an action in his own name for the

benefit of that corporation against the other corporation for redress of such grievances and for an accounting between the two corporations; and may join both corporations as defendants: *Fitzgerald v. Fitzgerald & Mallory Constr. Co.*, 59 N. W. Rep. 838. The Supreme Court of Michigan has come to the conclusion that when three persons agree to build a railroad, and form a corporation for that purpose, two of them to furnish the capital, the third to have general charge of the construction, and the road to be sold when built and the proceeds equally divided, the third person could bind the corporation for supplies used in constructing the road, though not acting by any corporate authority: *Mich. Slate Co. v. Iron Range & H. B. Ry. Co.*, 59 N. W. Rep. 646; and that an injunction should not issue at the suit of a receiver to enjoin a creditor, who has garnished certain funds of the debtor corporation, from proceeding with his suit, as he has a right to be heard in such proceedings as to his right to the funds garnished: *Baldwin v. Hosmer*, 59 N. W. Rep. 669. On appeal from an order appointing a receiver, the Supreme Court of Washington does not consider itself limited to the jurisdiction of the appointing court, but will determine whether the order appealed from was authorized by the law and the facts: *Roberts v. Wash. Natl. Bk.*, 37 Pac. Rep. 26. According to the Supreme Court of California, an indictment of an officer of a corporation for making false entries, if it set out the entries *in hæc verba*, and allege them to be false, need not state wherein they were false: *Peo. v. Leonard*, 37 Pac. Rep. 222; and the Supreme Court of Texas has decided that a private corporation may be sued for causing death, under a statute which provides that an action for damages may be brought "when the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another": *Fleming v. Texas Loan Agency*, 27 S. W. Rep. 126.

The Supreme Court of Indiana holds to the doctrine that a deed to the "heirs" of a living person is void for uncertainty as to grantees: *Booker v. Tarwater*, 37 N. E. Rep. 979; but the Court of Civil

Deeds

Appeals of Texas thinks that a deed of so many acres of land out of a tract described is not void for uncertainty, but conveys a proportionate undivided interest: *Linnartz v. McCulloch*, 27 S. W. Rep. 279. In the opinion of the Supreme Court of Pennsylvania, when the grantor permits the use of the land for eleven years in breach of a condition, with knowledge of that fact, equity should not permit a forfeiture: *Lehigh Coal & Nav. Co. v. Early*, 29 Atl. Rep. 736. And the Court of Appeals of Maryland has ruled that when a deed reserves a road through the land conveyed, in order to enable the grantor to reach a highway from other lands owned by him, the presumption is, in the absence of a clear indication in the deed to the contrary, that he reserves only the use of the road, and not the fee therein: *The Redemptorist v. Wenig*, 29 Atl. Rep. 667.

The Supreme Court of New York, Fifth Dept., has lately decided that when a contractor, who is erecting a house, refuses to allow the owner to enter, during the
 Ejectment process of construction, for the purpose of inspecting it while the work is in progress, ejectment will lie: *Smith v. Revels*, 29 N. Y. Suppl. 658.

According to the Supreme Court of Kansas, when the certificate of nomination, in due form, is presented to the
 Elections county clerk in time for filing, a failure on his part to mark it filed, and the loss of it through his negligence, will not affect the validity of the nomination: *Rathburn v. Hamilton*, 37 Pac. Rep. 20; and the same court has very justly decided that when all the voters of a township used tinted sample ballots by mistake, the official ballots being all returned unused, and the election was regular in all other respects, the ballots were properly counted: *Boyd v. Mills*, 37 Pac. Rep. 16. The number of votes cast at an election, however, as has been ruled by the Supreme Court of Nebraska, is not conclusive of the number of qualified voters in the district: *Fullerton v. Sch. Dist.*, 59 N. W. Rep. 896.

The Supreme Court of Rhode Island holds that when a

person purchases a lot in a platted addition to a city, he acquires a private right of way over the streets thereof; and the fact that such a street is afterwards taken as a highway does not prevent the owner of the lot from recovering damages from a railroad company which closes such street, so as to leave his lot in a *cul-de-sac*, for the actual injury to his lot: *Johnson v. Old Colony R. R.*, 29 Atl. Rep. 594. The Supreme Court of Maryland has decided that when, in a like case, the original owner of the land has sold a lot described as abutting on a certain alley, the alley is dedicated to the public; and an ordinance enacting that the portion of the alley between lots reserved by her should be closed; and authorizing her to erect a building thereon, shutting off others from access to a street with which the alley connected, was invalid, as a taking of the easement of the other lot owners for private use: *Van Witson v. Gutman*, 29 Atl. Rep. 608. The Supreme Court of Illinois has made a similar ruling in *Field v. Barling*, 37 N. E. Rep. 850, to the effect that an ordinance granting to private parties the right to construct for their own use a bridge over a public alley is invalid, as cities hold the fee of the streets for public uses only.

According to a recent decision of the Supreme Court of Nebraska, that court, on error from a justice of the peace to the district court, and then from the affirmance of the judgment to the Supreme Court, will only consider errors assigned to the district court: *Weeks v. Wheeler*, 59 N. W. Rep. 554. The Supreme Court of Missouri holds that when a cause is reversed and remanded, with directions to modify the judgment in a certain specified manner, the court below has no discretion to open the judgment in order to adjust rights of parties accrued pending the appeal; but that those must be settled by a new suit. All that the lower court can do is to carry out the mandate of the Supreme Court: *Young v. Thrasher*, 27 S. W. Rep. 326.

This same court has introduced a dangerous innovation into the law of error and appeal, by a divided court, the judges

standing four to three in favor of the point decided. The decision is to the effect that when the damages recovered in an action at law are excessive, the Supreme Court may require the plaintiff to remit the excess, as a condition of affirmance, without depriving either party of his right to a trial by jury: *Burdick v. Mo. Pac. Ry. Co.*, 27 S. W. Rep. 453. The dissenting judges were Sherwood, Barclay and Gantt, and that fact of itself is enough to overrule the majority opinion, even without the cogent reasoning with which they support their position. The power of the Supreme Court over damages that are capable of liquidation is unquestionable; but to extend this to damages for a tort, which lie wholly within the discretion of the jury, has rarely been attempted, and has met with deserved failure. With all due respect for that august body, it is a matter of which it is utterly incapable to judge properly.

The Court of Appeals of Maryland has decided that in an action on a policy of life insurance, copies of the record of deaths of the city of Baltimore cannot be offered in evidence to show the nature of the disease from which the relatives of the insured died, as they are unsworn statements and hearsay: *Met. L. I. Co. of N. Y. v. Anderson*, 29 Atl. Rep. 606. This reasoning, however, ought not to apply to records made up from the sworn affidavits of the attending physicians, as they are in other states. The Supreme Court of Michigan has very justly ruled, that as the statutes and reports of other states are documents, whenever the law of a state, as shown by them, is undisputed as to the point in question, the court may properly charge as a fact that such is the law: *Rice v. Rankins*, 59 N. W. Rep. 660; and the Supreme Court of Nebraska has adjudged that as against strangers thereto, a receipt is incompetent evidence of the payments thereby acknowledged, being, so far as they are concerned, but the hearsay declaration of the party who made it: *Ellison v. Albright*, 59 N. W. Rep. 703.

The Supreme Court of Wisconsin holds that the competency of a five-year-old child to testify is a matter within the

discretion of the trial court: *State v. Juneau*, 59 N. W. Rep. 580; and that a person who claims no interest in the suit, and through whom neither party claims, is competent to testify to a conversation between plaintiff's manager and a deceased defendant: *Curtis v. Hoxie*, 59 N. W. Rep. 581. Somewhat more doubtful is the ruling of the Supreme Court of Rhode Island, that the defendant to an action by a surviving partner may testify as to conversations with the deceased partner, as, the conversations being with the partnership, the death of the deceased partner is not the death of the other party within the statute: *Clapp v. Hull*, 29 Atl. Rep. 687. There are numerous cases to the same effect; but the Supreme Court of Pennsylvania enunciated a sounder doctrine when it ruled the opposite in *Dick v. Williams*, 130 Pa. 41.

The Supreme Court of South Dakota reached a just conclusion in *Brown v. Edmunds*, 59 N. W. Rep. 731, by deciding that a watch and chain, habitually carried
 Execution upon the person of the debtor, for his own convenience, and not used by his household, nor for the benefit or comfort of the family, is not exempt as "household furniture." Yet one can imagine how Sergeant Buzfuz would have expiated on the value of that watch in securing the proper cooking of soft-boiled eggs, the getting of produce to the train in time for market, etc., etc.

According to the sound rule adopted by the Supreme Court of Ohio, when the defendant in a prosecution for forgery
 Forgery admits the making of the signature, the burden of proof is not on him to prove that he had authority, but on the state to prove that he signed the name without authority: *Romans v. State*, 37 N. E. Rep. 1040. See *Peo. v. Wiman*, 23 N. Y. Suppl. 1034.

In the opinion of the Supreme Court of Kansas, a creditor, who, in absolute good faith, takes the property of his debtor
 Fraudulent Conveyances at a fair valuation in payment of an honest debt, commits no fraud against any one, although the payment of his debt may absorb the entire property of his debtor: *Hasie v. Connor*, 37 Pac. Rep. 128; and according

to the Supreme Court of Washington, a mortgage given in good faith to a creditor, by a firm doing a paying business, is not void as to other creditors because its debts were greater than its assets, apart from the good-will, when the mortgage was given: *Brookes v. Skookum Mfg. Co.*, 37 Pac. Rep. 284; and a mortgage given to secure a *bona fide* debt is valid, by the ruling of the Supreme Court of Texas, though an ulterior purpose of the debtor is to prevent the property mortgaged from being subjected to the claim of another creditor: *Haas v. Kraus*, 27 S. W. Rep. 256; but the Supreme Court of Missouri has very properly decided that absolute deeds, given by one banking house to another as security for loans and discounts, and withheld from record for three years, so as not to injure the debtor's credit, are, as matter of law, fraudulent as to subsequent creditors: *State Sav. Bk. v. Buck*, 27 S. W. Rep. 341. The Supreme Court of Michigan has permitted a deed, executed by sons to a father, who had great influence over them, for their interest in certain lands, with the understanding that he would only use it to induce their sister to do likewise, to be rescinded in equity, though the sons were participants in their father's fraudulent design: *Peek v. Peek*, 59 N. W. Rep. 604; and the Supreme Court of Wisconsin has held that when the son-in-law and housekeeper of a trustee purchases lands from one to whom they had been fraudulently conveyed by the trustee, the mere taking of a deed therefor from the trustee is not sufficient to charge them with notice of the breach of trust, if the price paid is adequate: *Hawley v. Tesch*, 59 N. W. Rep. 670.

The Supreme Court of Michigan holds that a guardian, who has enough personalty in her hands for the maintenance of her wards, cannot charge their real estate by her contracts for necessities: *Roscoe v. McDonald*, 59 N. W. Rep. 603.

A curious question has recently been decided by the Supreme Court of California, where the board of directors of the state prison attempted to close a public highway running through the prison grounds; and it was

Guardian and
Ward

Highways

held that they could not do so, even though it facilitated the escape of prisoners, because the easement which the public have in a highway does not merge in the fee of the servient estate, when acquired by the state: *Peo. v. Marin Co.*, 37 Pac. Rep. 203. It might have been urged with equal truth that the state in its corporate capacity, as owner of the prison grounds, and the public in its collective capacity, as owner of the easement in the highways, were in the eye of the law distinct entities. The state can sell the grounds used as a prison; it cannot barter away the easement of the public in the streets.

The Supreme Court of Nebraska holds that, notwithstanding the married women's acts, the husband may recover to the extent that the injury sustained by the wife incapacitates her from performing the duties that reasonably devolve upon her in the marriage relation, such as her services and companionship: *Omaha & R. V. Ry. Co. v. Chollette*, 59 N. W. Rep. 921. This is based on the decision of the Supreme Court of Iowa, made years ago, in *Mewhister v. Hatten*, 42 Iowa, 288.

The wife meets with equal consideration. The Supreme Court of Arkansas will permit her to claim a homestead which she continues to occupy with her family after the husband has become a fugitive from justice: *Hollis v. State*, 27 S. W. Rep. 73; and the Supreme Court of Missouri will not allow non-resident creditors a remedy against a married woman, also non-resident, which the laws of that state deny to residents, on the rather flimsy principle that the *lex fori* governs as to remedies: *Ruhe v. Buck*, 27 S. W. Rep. 412. But by the *lex loci contractus* she was liable to suit; and on the authority of *Hill v. Chase*, 143 Mass. 129; S. C., 9 N. E. Rep. 30; and *Baum v. Birchall*, 150 Pa. 165; S. C., 24 Atl. Rep. 620; as well as of the other authorities cited by Sherwood, J., in his dissenting opinion, the decision seems unsound. The same court did better when it held, in *Porter v. Reed*, 27 S. W. Rep. 351, that married women, though under disability, are proper defendants to a suit in equity to prevent multiplicity of actions.

The Supreme Court of Texas seems to stick in the bark when it claims that a fire insurance policy, containing a clause that it shall at once become null and void, and the unearned premiums be returned, if the premises become vacant without consent of the company, is avoided by a vacancy of three days, incident to a change of tenants: *East Tex. F. I. Co. v. Kempner*, 27 S. W. Rep. 122; but the Supreme Court of Nebraska is unquestionably right in deciding that, when a policy provides that no action shall lie unless begun within six months after the loss, and that the damages are payable sixty days after satisfactory proofs of loss are furnished, the six months' limitation does not begin to run until the expiration of the sixty days: *German Ins. Co. v. Davis*, 59 N. W. Rep. 698.

The Supreme Court of the United States, over the dissent of Chief Justice Fuller and Justices Brewer and Jackson, has recently decided that the provisions of § 12 of the Interstate Commerce Act, authorizing circuit courts, on refusal of any person to obey a subpoena issued by the interstate commerce commission, to order such person to appear before the commission to give evidence, and to punish a failure to obey such order as a contempt, are constitutional: *Interstate Commerce Commission v. Bruneau*, 14 Sup. Ct. Rep. 1125. The whole proceeding bears a suspicious resemblance to an attempt to do an illegal act by legal means; and it would be hard to find an analogy to it that has stood the test of investigation. It is to be feared that in this, as in so many other recent cases, both in federal and state courts, the court has been misled into considering the end, rather than the means by which it was to be attained.

The Supreme Court of Nebraska has allowed itself to be persuaded into a reaffirmance of the strictly logical and legal, but wholly inequitable doctrine, that when a judgment is rendered in a suit begun before the term, its lien relates back to the first day of the term, and is prior to that of a mortgage executed during the term, but before the rendition of judgment: *Norfolk St. Bk. v. Murphy*,

59 N. W. Rep. 707. To their honor be it said, Ryan and Ragan, CC., dissented. If it is really impossible for the courts to break away of their own motion from doctrines like these, the legislature should be at once informed and convinced of its duty to take the matter in hand.

The same court holds that, when there is a contract between the owner of land and another person, by which the latter is to cultivate the land and harvest the hay grown thereon for a share thereof, but the relation of landlord and tenant is not created, and there is no specific agreement as to the possession of the land, the parties become tenants in common of the crop; and if one seizes the whole, either before or after severance, and disposes of it in denial of the other's right, the other may maintain trover for his share: *Reed v. McRill*, 59 N. W. Rep. 775. The Supreme Court of Minnesota has decided that neither a mortgagee in possession, nor an assignee of rents growing out of a lease assigned to him as security, has such an estate as brings him in privity with the lessee under a lease executed by the mortgagor, so as to make him liable upon the covenants in the lease: *Cargill v. Thompson*, 59 N. W. Rep. 638. The Supreme Court of Michigan has ruled that when, by the terms of a lease, buildings are to be removed by the lessee on expiration of the term, a refusal to permit their removal is a conversion: *Osborn v. Potter*, 59 N. W. Rep. 606; and the Supreme Court of Nebraska has held that a ratification by the landlord of the unauthorized act of a tenant in erecting buildings, by allowing the cost of the buildings as a proper charge against him on settlement, will render the estate of the landlord liable to a mechanics' lien arising out of the improvements: *Scroggin v. Natl. Lumber Co.*, 59 N. W. Rep. 548. By a decision of the Supreme Court of Massachusetts, lessees who are bound to rebuild can recover the full value of buildings from a railroad negligently setting them on fire: *Anthony v. N. Y., P. & R. Co.*, 37 N. E. Rep. 780.

According to the Supreme Court of Michigan, one who has

cut and rafted logs under a contract, by the terms of which he is entitled to retain possession until paid for his services, has a common law lien thereon, if he complies with the contract; and the fact that the owner obtains possession will not defeat the lien, if that possession is tortiously obtained: *Haughton v. Busch*, 59 N. W. Rep. 621.

The Supreme Court of Arkansas, after discussing the apparently conflicting cases, has arrived at the conclusion that a delivery of liquor to one who promises to return it in kind, is not a "sale," if made in good faith; but if it is a mere subterfuge, it is a sale, within the meaning of the statute: *Robinson v. State*, 27 S. W. Rep. 233. Fairly representative cases are, on the one hand, *Com. v. Abrams*, 150 Mass. 393; S. C., 23 N. E. Rep. 53; and on the other, *Gillan v. State*, 47 Ark. 555; S. C., 2 S. W. Rep. 185. The Supreme Court of Michigan has decided that knowledge that the vendee is selling liquors illegally is no defence to an action by the vendor for the price: *Gambs v. Sutherland*, 59 N. W. Rep. 652; though a contrary doctrine prevails in Massachusetts: *Graves v. Johnson*, 30 N. E. Rep. 818.

The Supreme Court of Nebraska, which has been making law rapidly of late, has ruled that after a contract of hiring expires, the law does not imply that the after services were rendered on the original contract, so as to exclude parol evidence of different terms: *Hale v. Sheehan*, 59 N. W. Rep. 554. The Court of Civil Appeals of Texas thinks that the legislature has power to declare what class of employés shall thereafter be considered as fellow servants: *Galv., H. & S. F. Ry. Co.*, 27 S. W. Rep. 426; and the Supreme Court of California, that the mate of a ship engaged in carrying freight and passengers between distant points is a fellow servant of a man employed in the steward's department to wait on the officers' table: *Livingston v. Kodiak Packing Co.*, 37 Pac. Rep. 149; though if a mate is not a vice-principal, it will be hard to define the latter term. Yet the House of Lords treats the master of a vessel as a fellow

servant with the seamen: *Hedley v. Pinkney & Sons S. S. Co.* [1894] App. Cas. 222. The Supreme Judicial Court of Massachusetts, however, holds that an employé of a railroad riding to and from work on a free ticket given him by the defendant company, is a passenger, not a fellow servant of the crew, during that ride: *Doyle v. Fitchburg R. R.*, 37 N. E. Rep. 770. The Appellate Court of Indiana has decided, rather at variance with the weight of authority, that when a stone, insecurely placed by the order of a fellow servant in charge of the yard, fell on a workman and injured him, the master was liable for his neglect to provide a safe place to work: *Blondin v. Oolite Quarry Co.*, 37 N. E. Rep. 812; and the Supreme Court of Missouri, that if a railroad neglects its statutory duty to fence its tracks, it will be liable for the death of an engineer due to a collision with a bull that had come on the track through a defect in the fence: *Dickson v. Omaha & St. L. Ry. Co.*, 27 S. W. Rep. 476.

As usual, the subject of mechanics' liens bears its share of fruit. The Supreme Court of Illinois has held, that when a corporation is a sub-contractor, a notice signed by
 Mechanics' it, or its attorney, without the corporate seal, is
 Liens sufficient: *Carey-Lombard Lumber Co. v. Fullenwider*, 37 N. E. Rep. 899; the Supreme Court of Washington, that the fact that a person entitled to a mechanics' lien assigns his claim against the owner of the land as collateral security, will not defeat his right to claim the lien, as the assignment is a merely equitable one: *Potvin v. Denny Hotel Co.*, 37 Pac. Rep. 320; and the Supreme Court of Indiana, that in an action to foreclose a mechanics' lien, persons to whom the property was conveyed after record notice of intent to file a lien, and who claim to be owners thereof, are proper parties: *Vorhees v. Beckwell*, 37 N. E. Rep. 811. The Supreme Court of Pennsylvania, in that mania for spying out unconstitutionality that seems to afflict it, has lately decided that an act providing that no contract between the owner and the contractor shall interfere with the right of a sub-contractor to file a lien, unless he agrees in writing to be bound by the contract between the

contractor and owner, is unconstitutional, as an unwarrantable interference with the undefeasable right of acquiring and possessing property: *Waters v. Wolf*, 29 Atl. Rep. 646. This has a very fine sound; but compared with the brief dissenting opinion of Justice Mitchell, it lacks harmony. In his view, the act was nothing more than a regulation of future contracts, one wholly within the power of the legislature. Certainly, it was not as fundamental a disturbance of the right of acquiring and possessing property as the act which declared that no ground rent thereafter created should be irredeemable; or than those imposing collateral inheritance taxes.

The Supreme Court of Louisiana has recently reaffirmed the doctrine, that the legislature may delegate to a municipal corporation power to adopt and enforce ordinances of special and local importance, though general statutes exist relating to the same subject; and that the same act may constitute a crime against the public law of the state, and also a petty offence against a municipal regulation; but that the two offences are different, and either or both may be punished without violating any constitutional right of the party accused: *City of Monroe v. Hardy*, 15 So. Rep. 696.

The United States Circuit Court for the District of Massachusetts, in *In re Saito*, 62 Fed. Rep. 126, has refused to naturalize a native of Japan, on the ground that, being of Mongolian race, he was not included within the term "white person:" Rev. Stat. U. S., § 2169. The same was held as to the Chinese, even before the act forbidding their naturalization: *In re Ah Yup*, 5 Sawyer, 155. The general rule as to the interpretation of the word "white" is, that it includes only those who have over 50 per cent. of white blood in their veins, half breeds being therefore excluded: 2 Kent Com. 72; *Williams v. School Dirs.*, Wright (Ohio), 578; *Gray v. State*, 4 Ohio, 353; *Jeffries v. Ankeny*, 11 Ohio, 372; *Thacker v. Hawk*, 11 Ohio, 377; *Lane v. Baker*, 12 Ohio, 237; *In re Frank Camille*, 6 Sawyer, 541; S. C., 6 Fed. Rep. 256. At the same time, a state of affairs that permits

the most degraded negro to vote, but excludes the members of a nation as intelligent as the Japanese, calls loudly for legislative correction.

The Supreme Court of Michigan has decided in *Talmage v. Smith*, 59 N. W. Rep. 656, that when a boy goes on a shed belonging to the defendant, who throws a stick at him and puts out his eye, he can recover, though a trespasser, as he could not anticipate the throwing of the stick; and the Supreme Court of Kansas has ruled that the mere fact that a coal miner, engaged by a mining corporation in sinking a coal shaft, is a small stockholder in the corporation, will not prevent him from recovering damages for a personal injury caused by the negligence of the corporation, as such a stockholder has no personal control or management of the coal shaft, or of the corporation or its property: *Morbach v. Home Min. Co.*, 37 Pac. Rep. 122.

The law of nuisances has received a valuable addition in the careful opinion of the Supreme Court of Nebraska in *Beatrice Gas Co. v. Thomas*, 59 N. W. Rep. 925, which rejects the fallacious doctrine of *Brown v. Illius*, 27 Conn. 84, and *Ballard v. Tomlinson*, 26 Ch. D. 194, holding that there is a distinction between an injury caused by the percolation of filth through the ground and that due to the contamination of a subterranean watercourse, and follows *Kinnaird v. Oil Co.*, 89 Ky. 468; S. C., 12 S. W. Rep. 937, to the effect that one who collects injurious or offensive matters upon his premises, which by percolation, transmission through subterranean streams or otherwise, pollutes his neighbor's well, is liable for the damages thereby sustained. See *Hauck v. Tide Water Pipe Line Co.*, 153 Pa. 566; S. C., 32 W. N. C. 45; 26 Atl. Rep. 644.

The Supreme Court of Florida holds that a suit cannot be maintained against the sureties on an official bond conditioned "for faithful collection of taxes and prompt payment thereof," for fees due a publisher for advertising sales of land for taxes, which had come into the hands

of the officer; such a withholding of money due being official misconduct, but not a breach of the bond: *State v. Montague*, 15 So. Rep. 589. And the Supreme Court of Washington has decided that a board of county commissioners, having power to contract for the services of a county physician, has power to make such a contract for a year, though members of the board are about to go out of office in a few days: *Webb v. Spokane Co.*, 37 Pac. Rep. 282.

According to the Supreme Court of Arkansas the service of a summons by the plaintiff's attorney is void, he not being a disinterested party: *Rutherford v. Moody*, 27 S. W. Rep. 230; and in the opinion of the Appellate Court of Indiana a motion by the plaintiff for judgment *non obstante veredicto* does not raise the point that judgment should be rendered for the plaintiff on the answers to interrogatories, notwithstanding the general verdict: *Marion St. Ry. Co. v. Carr*, 37 N. E. Rep. 952.

Criminal practice never fails to furnish something new. The Supreme Court of California has decided that when, pending a prosecution, the part of the county in which the offence was committed is erected into a new county, such new county has jurisdiction of the offence, the prosecution in the old county having been dismissed: *Peo. v. Stokes*, 37 Pac. Rep. 207; the Supreme Court of Vermont has ruled, that when the statute does not clearly and definitely apprise the defendant of the charge against him, an indictment charging the offence in the words of the statute is insufficient: *State v. Fisher*, 29 Atl. Rep. 633; the Supreme Court of Wisconsin, that it is within the discretion of the court to permit a juror to attend his place of business during a criminal trial: *Baker v. State*, 59 N. W. Rep. 570; the Supreme Court of South Carolina, that if, after the jury has been sworn, a juror states to the court that he has formed and expressed an opinion, it is error to let the trial proceed with that juror: *State v. Cason*, 19 S. E. Rep. 918; and the Supreme Court of Pennsylvania, that when, after a verdict has been announced,

recorded, and affirmatively responded to by the entire jury, the latter is erroneously polled, the separate answers given by the jurors, if not in accord with the verdict, may be treated as surplusage: *Com. v. Schmous*, 29 Atl. Rep. 644.

The Court of Criminal Appeals of Texas has made a decided advance in holding that a new trial should have been granted when, by the voluntary affidavit of a juror, it appeared that the deponent had told the other jurors facts known to him prejudicial to the defendant: *Ellis v. State*, 27 S. W. Rep. 136. This is in direct contravention of the general rule, which invests the verdict with such absurd sanctity, that a juror cannot impeach it, even in cases like the present, though he may testify in support of it: *Taylor v. Com. (Va.)*, 17 S. E. Rep. 812; but the Supreme Court of the United States has held that they can testify to the fact of extraneous influence, but not to its effect: *Mattox v. U. S.*, 146 U. S. 140; S. C., 13 Sup. Ct. Rep. 50. There is no reason for blindly clinging to the old rule; it is as unreasonable as that of *nemo audietur allegans suam turpitudinem*, and should have been exploded with that. The utter absurdity to which it is carried is well shown by a recent decision of the court of Blair county, Pa., that a verdict obtained by the toss of a cent could not be disturbed on the affidavit of a juror to that effect. See *The Philadelphia Record* for Friday, August 31st.

According to the Supreme Court of Illinois, when a note provides for compound interest, but the interest is not secured by coupons, only simple interest is recoverable: *Promissory Notes* *Bowman v. Neely*, 37 N. E. Rep. 840; and a note given in payment for corporate stock, which recites that the certificate of stock is to be surrendered on payment of the note, is not negotiable: *Van Zandt v. Hopkins*, 37 N. E. Rep. 845.

The Supreme Court of California has decided that a broker's right to commissions for procuring a purchaser for land under an agreement therefor, is not affected by the fact that he knew the principal had title to only five-sixths of the land, on which account the deal fell through: *Real Estate Brokers*

Martin v. Ede, 37 Pac. Rep. 199; but the Supreme Court of Michigan has ruled that a real estate agent is not entitled to commissions from the vendee as agreed on, when the agent asked the vendee a price greatly in excess of that fixed by the vendor, and concealed the fact that he had been instructed to sell at the reduced price: *Phinney v. Hall*, 59 N.W. Rep. 814.

In the opinion of the Supreme Court of Pennsylvania, the school board of a city has a right to exclude a pupil who will not submit to be vaccinated during a small-pox scare: *Duffield v. School Dist. of Williamsport*, 29 Atl. Rep. 742; but the Appellate Court of Indiana holds that the board cannot refuse to pay a teacher, employed for a certain time, for the full period, on the ground that the school was closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, since such closing of the school was not caused by the act of God: *Gear v. Gray*, 37 N. E. Rep. 1059; following *Dewey v. Alpena School Dist.*, 43 Mich. 480; S. C., 5 N. W. Rep. 646.

It is also the opinion of the Supreme Court of Pennsylvania, that when a corporation pays tax on its capital stock, the same stock cannot be taxed again in the hands of the separate holders of the shares: *Com. v. Lehigh Coal & Nav. Co.*, 29 Atl. Rep. 664; while according to the Supreme Court of the United States, a statute, providing that the rolling stock of a railroad shall be listed and taxed in the several counties through which it passes, in the proportion that the length of the main track in that county bears to the main track used and operated by the company, is not invalid, as requiring an assessment of property outside the state: *Pittsb., C. C. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. Rep. 1114; aff. S. C., 33 N. E. Rep. 432; nor is the assessment of a road partly within and partly without the state, by ascertaining the value of the whole line, and then determining the value of that part within the state, invalid: *Cleveland, C. C. & St. L. Ry. Co. v. Backus*, 14 Sup. Ct. Rep. 1122; aff. S. C., 33 N. E. Rep. 421.

By a recent decision of the Court of Civil Appeals of Texas, a provision on a telegraph message that the company shall be
 Telegraph Companies liable only for the cost of transmission, unless the message is repeated, is waived if the sender, some time after sending the message, suggests to the agent that it be repeated, and the agent says that this would be useless, as the message had gone through "all right:" West. Union Tel. Co. *v.* Reeves, 27 S. W. Rep. 318; but the Appellate Court of Indiana holds that a telegraph company is not liable to a penalty for failure to transmit messages impartially, when it inadvertently receives a message for transmission to a point at which it has no office: Peterson *v.* West. Union Tel. Co., 37 N. E. Rep. 810.

The Privy Council of England has lately rendered an interesting trade-mark decision, on appeal from New South Wales, in Natl. Starch Mfg. Co. *v.* Munn's Pat. Maizena & Starch Co. [1894] App. Cas. 275. The appellants had invented the word "Maizena" for their product in 1856, but had never registered it in the colony until 1889, although they had registered it and enforced it in other countries, and had allowed it to be used as a term descriptive of the general article rather than of their own manufacture. It was accordingly held that the word had become *publici juris*, and could not be registered as a trade-mark; and further, that as the respondents, in applying the word to their own manufacture, did not try to pass it off as that of the appellants, by the use of labels and packets calculated to deceive the public on that point, but on the contrary stated the name of the maker, the place of manufacture, and other necessary particulars, they would not be restrained from using it.

The Supreme Court of Kansas has ruled that when a vendor sells and delivers goods at prices and on terms of
 Vendor and Vendee payment definitely fixed by the contract, but retains the right to elect to take back the goods remaining unsold by the vendee, as the property of the vendor, the latter is not the owner of the goods until after the actual exercise of such election, and creditors of the vendee, who

attach those goods prior to any election by the vendor, acquire a valid lien thereon: *Moline Plow Co. v. Rodgers*, 37 Pac. Rep. 111. But according to the Court of Errors and Appeals of New Jersey, when goods are sold on the terms that the vendee shall give notes for the purchase price, but that the title shall remain in the vendor until a mortgage given to secure the notes or the price is paid, and no rights of innocent third parties intervene, the title continues in the vendor, though he recovers judgment on the notes, and after such judgment he may reclaim the goods by replevin: *Campbell Print. Press & Mfg. Co. v. Rockaway Publ. Co.*, 29 Atl. Rep. 681.

The Supreme Court of New Hampshire holds that specific bequests to named legatees, to take effect at the death of testator's wife, vest at the death of testator: *Hall*
Wills *v. Wiggin*, 29 Atl. Rep. 671; and the Supreme Court of Pennsylvania has decided that if no trustees are appointed, a proviso that an absolute bequest of a life estate shall not be liable to the debts of the donee will not protect it from sale by creditors (which is a most wise limitation of the doctrine of spendthrift trusts): *Ehrisman v. Sener*, 29 Atl. Rep. 719; and that the word "between" in reference to two classes of devisees will make a distribution *per stirpes*, and not *per capita*, in spite of the frequent confusion of that word with the word "among:" *Ihrie's Est. (Levy's App.)*, 29 Atl. Rep. 750.